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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

NUMBER 99

J. F. LAWRENCE ET AL., APPELLANTS,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, APPELLEE.

BRIEF OF THE APPELLANTS.

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BRIEF OF THE APPELLANTS.

PRELIMINARY STATEMENT.

This is an appeal from the final decree of the District Court for the Northern District of Oklahoma (three judges sitting), holding that the Shops and Division Point Act of the Oklahoma Legislature is unconstitutional, and enjoining the Corporation Commission of the State, the Attorney General, and the citizens of Sapulpa from undertaking to enforce it.

It is the second time that the case has been before this Court. The first appeal was from an order by the same three district judges granting a temporary injunction, and this Court reversed the trial court (*Lawrence v. St. Louis-San Francisco Railway Co.*, 274 U. S. 588) because the

railway company had not applied to the Corporation Commission for permission to move, as required by the statute. While that appeal was pending in this Court, and before the decision, the Railway Company hurriedly moved its shops and division point from Sapulpa.

On May 31, 1927, this Court reversed the action of the three-judge court, and, upon the mandate being filed in the District Court, the Attorney General and the citizens of Sapulpa who were defendants in that action filed a motion in the District Court to require the railway company to restore the status existing at the commencement of the case by returning its shops and division point to Sapulpa (R. 17). This motion was filed on June 25, 1927, but was not heard by the court until October 22, 1927. At that time it was heard by the same three judges who granted the preliminary injunction, the defendants objecting, however, to three judges sitting and insisting that the motion was one which should be heard by the District Judge sitting alone (R. 24). The judges took the motion under advisement, but ordered the railway company to make application to the Corporation Commission to ratify its action in moving its shops and division point (R. 43).

On November 5, 1927, the railway company filed such an application before the Corporation Commission, but did not offer to restore its shops and division point in the event the Commission ruled against it (R. 63).

On November 28, 1927, the three-judge court filed an opinion denying the motion to require the railway company to make restitution (R. 44).

On December 5, 1927, the Corporation Commission declined to consider the application of the railway company on the ground that the railway company was in contempt and had not offered to purge itself of contempt (R. 86).

On January 12, 1928, the railway company filed a supplemental bill in this cause in which the proceedings before the Corporation Commission were set out in full (R. 54).

On January 17, 1928, the defendants in the District Court filed a motion to dismiss the bill and supplemental bill for want of equity (R. 88).

On March 12, 1928, the three-judge court, consisting of the same three judges, overruled the motion to dismiss and entered judgment for the railway company granting it a permanent injunction (R. 88).

This appeal brings to this Court for review the final decree of the District Court.

STATEMENT OF THE FACTS.

The material facts are stated in the previous opinion of this Court. They now all appear in the original bill commencing at page 1 of the record, and the supplemental bill commencing at page 54, and the exhibits attached to

these pleadings. The line of the Railway Company was originally built into Sapulpa, Oklahoma, in 1898, and shops and division point were then located at Sapulpa, and were continuously maintained there until the commencement of this action.

In 1917, the Railway Company indicated its intention of moving the shops and division point, and in February of that year Messrs. Lawrence and Taylor, as citizens of Sapulpa, filed an application before the Corporation Commission for an order preventing the Railway Company from making this move.

At the time this application was filed, the Commission entered a temporary order prohibiting the Railway Company from moving the shops and division point until after a hearing and the further order of the Commission (R. 751).

While this case was pending, and this temporary order in effect, the legislature of the State passed the Act of 1917, the constitutionality of which is now involved in this case.

For ten years nothing further happened. The railway company made no effort to move its shops and division point, and no further proceedings were taken in the case before the Corporation Commission.

In December, 1926, the railway company again indicated its intention of moving the shops and division point,

and the citizens of Sapulpa filed a motion in the case then pending before the Corporation Commission setting out that, notwithstanding the previous temporary order, and notwithstanding the Act of the legislature, the railway company was about to make the move.

The Corporation Commission thereupon issued a second temporary order prohibiting the removal until the further order of the Commission, and setting the cause for hearing in January of 1927 (R. 76).

The railway company thereupon, without appearing before the Commission, or in any wise seeking to set aside its two orders, and without seeking its permission in any other way, filed its bill in this cause and secured a temporary injunction enjoining the Corporation Commission, the Attorney General of Oklahoma, and the citizens of Sapulpa from proceeding further in the cause then pending before the Corporation Commission, from undertaking to enforce the orders which had been made by the Commission, and from taking any action under the statute on the ground that the statute was unconstitutional.

An appeal was immediately taken to this Court, and, while this appeal was pending, the railway company hurriedly moved its shops and division point under the protection of the temporary injunction.

THE STATUTE INVOLVED.

The Act of the Legislature of 1917, the validity of

which is involved in this case, is contained in Sections 3482 to 3485, inclusive, of the Compiled Oklahoma Statutes 1921, and reads as follows:

"3482. REMOVAL—PERMIT. That no person, receiver, firm, company or corporation owning, operating or managing any line of steam railroad in this State shall be allowed to remove railroad shops or division points which have been located at any place in this State for a period of not less than five years without previously securing the permission of the Corporation Commission to make such removal.

"3483. CORPORATION COMMISSION—JURISDICTION. If, and when any such person, receiver, firm, company or corporation desires to remove any such railroad shops or division point described in Section One of this act, it shall be his duty to file an application with the Corporation Commission setting forth the present location of such shops or division point and the reasons for such removal, and thereupon the Corporation Commission shall have full power and jurisdiction to entertain such complaint, but before hearing the same or making any order permitting such removal to be made, said cause shall be set down for hearing, not less than ten days' notice shall be given the city, town or village in which or at which such shops or division point have been maintained, and after giving all parties interested a full and complete hearing in the premises the Commission may, in its discretion, permit or refuse such request for a removal.

"3484. HEARING—BEFORE CORPORATION COMMISSION. When an application is filed before the Commission for the removal of terminals or car shops, as provided in Section Two, the Commission shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting the various inter-

costs involved. In determining the adequacy of the present facilities the Commission shall consider the same increased by an expenditure equal to the amount necessary to remove the same to the proposed location or an amount equal to the necessary expenditure to establish such facilities at the new location. It is hereby further provided that the Commission shall hear evidence and shall make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health of the employees of the applicant or the health of their families. If the Commission should find that the sanitary or habitable conditions at the proposed location of said terminal facilities would endanger or injuriously affect the health of the employees of said applicant or their families, the Commission shall deny said application and order the said terminal facilities and car shops to remain at the present location.

"3485. PROOF—BURDEN UPON APPLICANT. On any such hearing, as provided in this Act, the presumption shall be against the removal, and the burden of proof rest upon the applicant to show that such removal ought to be made."

In the bill of complaint the railway company also quotes Section 5548 of the Compiled Statutes 1921, but this section is not a part of the 1917 Act, was passed ten years earlier, and is not involved in this cause.

ASSIGNMENT OF ERRORS.

The errors assigned are as follows:

1. That the court erred in overruling the motion of the defendants for restitution.

2. That the court erred in overruling the motion of

the defendants to dismiss the bill of complaint and the amended bill of complaint of the plaintiff.

3. The court erred in rendering judgment in favor of the plaintiff and against the defendants.

4. The court erred in holding that the Acts of the Legislature of 1917, pleaded in the bill of complaint in said cause, is in violation of the Constitution of the United States and void.

STATEMENT OF POINTS RELIED UPON.

1. That the action was prematurely brought.

The Act of the legislature in question provides that, after a railroad company has maintained its shops and terminals at any given point in the state for a period of five years, that it cannot remove them until after presenting an application to the Corporation Commission, and securing an order permitting it to do so. The appellee filed the bill in this case without presenting such an application and secured a temporary injunction. While this case was pending in this Court, on appeal from that order, the appellee moved its shops and division point from Sapulpa to West Tulsa in violation of the statute and of the two previous orders of the Corporation Commission. After the reversal by this Court, the appellants, or some of them, filed a motion in the District Court to require appellee to return its shops and division point. The District Court denied the motion, but directed appellee to make application to the Corporation Commission for an order ratifying its action in removing its shops and divi-

sion point in violation of the statute, and of the previous orders of the Commission. The Commission declined to entertain this application because the appellee was in contempt of its previous order. The Commission, therefore, has never passed on the right of the appellee to move from Sapulpa, and appellants contend that, therefore, this action is prematurely brought.

2. The statute involved is a valid exercise of the police power of the state, being enacted for the preservation of the health, safety, and convenience of the railroad employees, of the communities in which shops and terminals are located, and of the general public welfare.

3. The statute involved is a valid exercise of the power of the state to regulate railroads, there having been no assertion of national power over the subject.

4. The statute involved is not a regulation of interstate commerce, and if it affects interstate commerce at all, does so remotely and indirectly.

5. It is the duty of the district court, after this Court had reversed its previous order granting a temporary injunction to require the railroad company to restore the *status quo* existing at the time when the temporary injunction was issued.

6. Upon the application in the district court for an order of restitution, the matter should have been heard by the district judge and not by a three-judge court.

ARGUMENT.

First.

It was the duty of the Railway Company, before seeking relief in the Federal court, to comply with the Oklahoma Statute and the orders of the Corporation Commission.

We think this point has been decided by this Court on the first appeal.

It is true that this Court held that it was unnecessary to determine whether the Oklahoma Act is obnoxious to the Federal Constitution, but we submit that the decision plainly intimates that it was the duty of the railway company to follow the procedure outlined by the statute because this Court says, commencing at page 594 of 274 U. S.:

> "We have no occasion to determine whether the Oklahoma Act is obnoxious to the Federal Constitution. But as bearing upon the propriety of issuing the temporary injunction, the fact is important that the controversy concerns the respective powers of the Nation and of the States over railroads engaged in interstate commerce. Such railroads are subject to regulation by both the State and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The federal power is paramount. But public interest demands that, whenever possible, conflict between the two authorities and irritation be avoided. To this end it is important that the federal power be not exerted unnecessarily, hastily, or harshly. It is important also that the demands of comity and courtesy, as well as of the law, be deferred to. It was said in *Western & Atlantic R. R. v. Georgia Public Service Commis-*

sion, 267 U. S. 493, 496, that a law of a State may be valid which prohibits an important change in the local transportation conditions without application to the state commission, although the ultimate authority to determine whether the change could or should be made may rest with the federal commission. And it was there said that the 'action of the company in discontinuing the service without a petition' to the state body 'was arbitrary and defiant.' Compare *Henderson Water Co.* v. *Corporation Commission*, 269 U. S. 278. To require that the regulating body of the State be advised of a proposed change seriously affecting transportation conditions is not such an obvious interference with interstate commerce that on application for a preliminary injunction the Act should lightly be assumed to be beyond the power of the State."

In *Western & Atlantic Railroad* v. *Georgia Public Service Commission*, 267 U. S. 493, a question was involved which is almost identical with the one now under consideration. In that case the court was considering a rule promulgated by the Public Service Commission, General Order 14, which provided that any and all facilities and privileges enjoyed by shippers to which they were entitled by law or any rule of the Commission, whether granted by voluntary action on behalf of the railroad companies or otherwise, should not be discontinued without the consent of the railroad commission.

That order was the same in substance as the Oklahoma statute, except that it applied to all facilities and privileges while the Oklahoma statute only applies to railroads' shops and division points. The Court, in delivering the opinion in that case, at page 499 says:

"The three-judge court refused the application, on the ground that Rule 14 had not been complied with. Rule 14 is a reasonable rule and the Commission was fully justified in refusing to sanction a discontinuance of service until a petition had been filed with the Commission and a showing made. The doubt which arises in our minds is whether the Public Service Commission, by its consent to a full hearing of the issue without a formal petition and an order issued on the merits, did not waive the defect of a petition. The action of the company in discontinuing the service without a petition was arbitrary and defiant, but the subsequent action of the Commission seems to have condoned the fault in such a way as to prevent our making it a reason for not looking farther into the issues now raised by the company in its bill.

"It is said that the requirement of the continuance of the service deprived the company of its property without due process of law, in violation of the Fourteenth Amendment, because the service rendered by the side track was much greater in out of pocket cost than the compensation. This can not be sustained. The service has been rendered for years. It was a voluntary arrangement, and under its statutory powers (Sec. 2664, Georgia Code, 1910) was made irrevocable by the Public Service Commission under Rule 14, except by consent of the Commission. The spur track was for a public purpose. *Union Pac. R. Co. v. C. & N. W. Ry. Co.*, 233 U. S. 211. The requirement that such a service should not be discontinued without notice and hearing was clearly within the police power of the State. *Chicago & Northwestern R. R. Co. v. Dey*, 35 Fed. 866, 869; 1 U. S. 315; *Pub. Util. Com. of Western R. R. Co. v. Simmons*, 249 U. S. 422; *Railroad Commission v. L. & N. R. R. Co.*, 148 Ga. 442. Even if the cost of the switching is more than what is received for it, we can not determine on any showing made by the company that the switching does not work a benefit to the

increased business that the company gets, or may get, by reason of the added facilities furnished by the switching. The switch is a small part of the whole railway, and the mere fact that the switching may not be profitable by itself can not be a loss. See *Fort Smith Light & Traction Company* v. *Bourland*, 267 U. S. 330."

Here the action of the railroad company in taking advantage of the temporary injunction to remove its shops and division point was not only "arbitrary and defiant" but was also a gross abuse of the process of the court, and so completely changed the *status quo* as to annul the statute and destroy the power of the Corporation Commission; nor has the Commission here "condoned the fault", as was true in the Georgia case just quoted.

Second.

The application made by the Railway Company to the Corporation Commission did not comply with its duty or with the requirements of the Statute.

The application of the railway company to the Corporation Commission is Exhibit "A" to the supplemental complaint found at page 63 of the record. It appears on the face of this application (p. 70) that the railway company had moved its shops and division point in violation of two orders of the Corporation Commission (pp. 70-71) and of the statute of the State. The application then sets up the temporary injunction, that while the temporary injunction was in effect the railway company had moved its

shops and division point; that this Court had reversed the judgment of the district court granting the temporary injunction, and that the three-judge court had then ordered the applicant to petition the Corporation Commission to ratify its acts in violating the orders of the Commission and disobeying the laws of the State. The application prays that the Commission set aside its orders theretofore made, that the removal be approved, and that the Commission "ratify the action of applicant in removing its said shops and division point from the City of Sapulpa to the City of Tulsa" (p. 75).

The railway company in this application does not offer to return its shops and division point in the event the Commission denies its application.

Messrs. Lawrence and Taylor, the City of Sapulpa in its corporate capacity, and the Chamber of Commerce of the City of Sapulpa filed objections before the Commission to hearing this application "unless the St. Louis-San Francisco Railway Company purges itself of contempt by returning its shops and division point to the City of Sapulpa (p. 83), and in their objections state (p. 85):

"These objectors, therefore, respectfully show to the Commission that the railway company has flagrantly and defiantly violated both orders heretofore rendered by this Commission, and the statute of the State of Oklahoma applicable to such cases, and that said railway company in the present application does not offer to restore its shops

and division point to Sapulpa under any contingencies, even though the present application should be denied.

"Because said railway company is in contempt of this Commission, and does not in any way offer to purge itself of contempt, these objectors respectfully object to its application being heard by this Commission unless it restores its shops and division point to the City of Sapulpa, or in good faith offers to do so in the event this Commission denies its application and orders the railway company to return its shops and division point to the City of Sapulpa."

These objections were sustained (p. 87) and the Commission declined to hear the application of the railway company.

We respectfully submit that the Commission as a self-respecting body could not have done otherwise. The railway company came before the Commission proclaiming its disobedience to the previous orders, prayed that this disobedience be ratified, and made no offer whatever to comply with any order the Commission might make, and this, notwithstanding the fact that objections were filed and urged on the ground, not only that the railway company was in contempt but that it did not offer to purge itself of contempt in the event of an adverse decision by the Commission. This was a plain effort on the part of the railway company to play fast and loose with the Commission. If the Commission held with it, well and good; but, if the Commission held against it, it was refusing to return the shops and division point to Sapulpa.

The authorities are uniformly to the effect that a party in contempt cannot be heard to apply for affirmative relief which, in any way, recognizes and ratifies its contempt.

Campbell v. *Justices of Superior Court*, 187 Mass. 509, 69 L. R. A. 311, 73 N. E. 659, is one of the leading cases.

In that case the Justices of the Superior Court refused to proceed with the hearing of a suit because the moving party was in contempt. Whereupon he filed this action in the Supreme Judicial Court of Massachusetts seeking a writ of mandamus to require the Superior Court to proceed with the trial. In denying the application the court says (p. 313 of 69 L. R. A.):

> "The petitioner, who is the plaintiff in that suit, is in contempt of the court for a violation of an injunction. The principal question is whether a plaintiff who is in contempt has an absolute right to proceed in the trial, * * * such that it is the legal duty of the court, upon his request, to permit him to go on. The authorities agree upon the familiar doctrine that a party in contempt is not in a position to ask the court for any favor or indulgence."

In *Beaufort County Lumber Co.* v. *Cottingham* (N. C.), 84 S. E. 864, the third paragraph of the syllabus is as follows:

> "In an action for specific performance of a contract, where defendants accepted a conditional order for a continuance without complying with the condi-

tions, they were punishable by having their answer stricken out and judgment entered against them *pro confesso* on the complaint, under the general rule that a party in contempt in equity will not be allowed to oppose the relief sought by denial of the bill or by alleging any defense."

In *Knoob* v. *Knoob* (Cal.), 218 Pac. 568, the syllabus is as follows:

"A wife who has taken and keeps a child out of the state without the permission of the husband or of the court, in violation of a modified interlocutory divorce decree, will not be allowed to appeal from the order modifying the decree."

In *Soderberg* v. *Soderberg* (Cal.), 219 Pac. 82, it is said at page 85:

"No party to an action can with right or reason ask the aid or assistance of a court by modifying in his favor its legal orders while he stands in an attitude of contempt with regard thereto (*Weeks* v. *Superior Court*, 187 Cal. 620, 203 Pac. 93), and it matters not that no objection is made by either party. The court of its own motion may refuse aid under such circumstances. *Domenigoni* v. *Imperial Livestock, etc.* (Cal.), 209 Pac. 36."

In *Early* v. *Early*, 261 Fed. 1003, decided by the Court of Appeals of the District of Columbia, the fourth paragraph of the syllabus is as follows:

"Where the record shows that applicant is apparently in contempt of the Court of Appeals, the court may decline to hear oral argument from his counsel."

In *Burns* v. *Shapley* (Ala.), 77 So. 447, it is said at page 451:

"It is made to appear to the satisfaction of the court, by the return of the sheriff on the writ heretofore issued, and by other satisfactory evidence, that the appellee, Walter Shapley, has violated the order of this court by removing the children out of Baldwin County since the rendition of the judgment on the 18th day of December, 1917, and that he is secreting said children from the process of this court, and is therefore in contempt of the orders and authority of the court to enforce its judgment. It is well settled in this state that a party in contempt will not be heard on anything pertaining to the merits of the cause. *Mussina* v. *Bartlett*, 8 Port. 277; *Jacoby* v. *Goetter*, 74 Ala. 427; *Crabtree* v. *Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Ex parte Pearce*, 111 Ala. 99, 20 South. 343.

"An order will therefore be entered striking appellee's application for rehearing from the files, and directing the issuance of an appropriate writ for the apprehension of the said appellee, that he may be brought before this court to show cause why he should not be punished."

In *Casebolt* v. *Butler* (Ky.), 194 S. W. 335, the court says (p. 336):

"We have therefore directly presented for decision the question of the authority of a circuit judge to deny a litigant the right to prosecute an effective appeal from a judgment or order against him when he is in continuing contempt of court by purposely and persistently failing and refusing to obey the order of the court from which he desires to prosecute the appeal.

"The exact question here presented is a new one

in this state, although a very analogous question was before this court in *Wilson* v. *Com.*, 10 Bush 526, 19 Am. Rep. 76. In that case, after holding that a convicted prisoner who had escaped would not be permitted to prosecute an appeal to reverse the judgment of conviction, this court, in dismissing the appeal, said:

"'It seems to us clear, both upon principle and authority, that the motion ought to be sustained. The court ought not to do a nugatory act; yet, if we proceed to try this appeal, the appellant cannot be compelled to submit to our decision if it should be against him, and ought not therefore to be allowed to reap the benefit of a decision in his favor. He might thus be enabled to defeat the ends of justice entirely, for he may be able to keep beyond the reach of the officers until by the death or removal of witnesses or other causes his conviction upon a second trial would be rendered improbable, if not impossible. As he has chosen to undertake to relieve himself by flight, in contempt of the authority of the court and of the law, he cannot also invoke the aid of this court.'

"A similar conclusion was reached in *Norton* v. *Com.*, 76 Ky. 501.

"In *Smith* v. *United States*, 94 U. S. 97, 24 L. ed. 32, the Supreme Court of the United States, in refusing to hear a criminal case on the appeal of the defendant who had escaped jail and was a fugitive, said:

"'In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his

interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.'

"Other instructive cases on the subject of the right of a party in contempt to prosecute an appeal or to ask favors of the trial court are *Hovey* v. *Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215; *Campbell* v. *Justices*, 187 Mass. 569, 73 N. E. 659, 69 L. R. A. 311, 2 Ann. Cas. 462; *Tyler* v. *State*, 3 Okla. Cr. 179, 104 Pac. 919, 26 L. R. A. (N. S.) 921; and *State* v. *Scott*, 79 Kan. 692, 79 Pac. 126, 3 Ann. Cas. 511. In the Ann. Cas., as well as in the L. R. A., there will be found full notes on this subject, and the unanimous opinion of the courts is that an appeal will not be entertained on behalf of a person convicted of crime who has escaped and is a fugitive from justice, although the practice in some states is to continue the matter of dismissal for a reasonable time in order to give the fugitive an opportunity to surrender himself.

"We see no reason why the practice announced in these criminal appeals should not be applied to the case in hand. Here the very party who is asking that the record be prepared so that he may prosecute an appeal is in contempt of court in refusing to obey the order from which he desires to appeal. In defiance of the court's orders, he has refused to deliver the child to its mother and has taken it to another state out of the jurisdiction of the court, so that the orders of the court cannot be enforced against him. If his appeal on a proper record should be brought to this court and the ruling of Judge Butler affirmed, there is no way by or through which the judgment of this court could be enforced. If the judgment was adverse to Casebolt, he would doubtless continue to keep the custody of the child and remain outside the jurisdiction of the court; but, if the judgment of this court was favorable to him, he would probably return with the child and submit himself to the juris-

diction of the court. In other words, the attitude of Casebolt is that:

"'If you decide the case in my favor, well and good, but, if you do not I will keep the child out of your reach, so that, no matter what the decision of the court may be, I will continue to have the custody of the child.'

"Under the circumstances such as these, we are clearly of the opinion that Casebolt should not be permitted to thus trifle with the court and so conduct himself as to make its orders and judgments a mere nullity unless he voluntarily saw proper to obey them."

The case of *Hovey* v. *Elliott*, 167 U. S. 409, is not in conflict with the authorities we have cited. In that case the court held that it was not within the power of the trial court to strike the defendant's answer from the files, and render judgment by default against him because he was in contempt, as that would be a denial of due process of law. In the opinion, however, the distinction is plainly drawn between that case and one in which a court denies affirmative relief to a party who is in contempt. This is illustrated by the following sentences quoted from page 423:

"It is not at all unlikely that the restriction was upon the party coming before the court by way of motion seeking affirmative action by the court in his favor. It is certain that neither in the Register nor in Comyns is there a suggestion that a party, while in contempt for disobedience of an injunction, might, for such cause, be defaulted upon the merits."

And again the following from the same page:

> "The difference between the want of power, on the one hand, to refuse to one in contempt the right to defend in the principal case on the merits, and the existence of the authority, on the other, to refuse to accord a favor to one in contempt, is clearly illustrated by the whole line of adjudicated cases."

And the following quoted from page 424:

> "That in the time of Lord Clarendon the practice of the Court of Chancery was only to deny to a party in contempt the privilege of having favorable action taken by the court upon applications addressed to its discretion finds support, not only in the case of *Phillips* v. *Bucks*, *supra*, but also in a decision of Sir H. Grimston, Master of the Rolls, who, in refusing an application for relief against a sequestration of lands of the defendant following a decree, assigned, among other reasons, the following: '3dly the defendant not having performed the decree by the payment of the money, he shall not receive any favour from the court whilst he stands in contempt.' Bacon's Abridgment, Sequestration, C', the marginal reference being to a case entitled Sands v. Darrell."

And by the following quoted from page 430:

> "The conclusion which we have reached accords with that of Daniell, who in his Chancery Pleadings and Practice (vol. 1, pp. *506) says:
>
> "'Besides the personal and pecuniary inconvenience to which a party subjects himself by a contempt of the ordinary process of the court, he places himself in this further predicament, viz.: That of not being in a situation to be heard, in any application which he may be desirous of making to the court. Lord Chief Baron Gilbert lays it down, that 'upon

this head it is to be observed, as a general rule, that the contemnor, who is in contempt, is never to be heard, by motion or otherwise, till he has cleared his contempt, and paid the costs; as, for example, if he comes to move for anything, or desires any favor of the court ?* * *.'

"'The rule, that a party in contempt cannot move till he has cleared his contempt, is, in practice, confined to cases where such party comes forward voluntarily and asks for an indulgence; and, therefore, a defendant cannot object to a cause being heard because the plaintiff is in contempt. So a defendant in contempt is entitled to production of documents.'"

Hammond Packing Company v. *Arkansas*, 212 U. S. 322, upheld an Arkansas statute which authorized the court to strike from the files the pleadings of a defendant failing to comply with the terms of an order requiring the production of witnesses, books and papers. At page 351 it is said:

"As pointed out by the court below, the law of the United States as well as the laws of many of the States, afford examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for. Rev. Stat. U. S. Sec. 724, which was drawn from Sec. 15 of the Judiciary Act of 1789, after conferring upon courts of law of the United States the authority to require parties to produce books and writings in their possession or under their control which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery, expressly empowers such courts, if a plaintiff fails to comply with the order to render a judgment of non-suit, and if a defendant

fails to comply 'the court may, on motion, give judgment against him by default.' From the time of this enactment, practically coeval with the Constitution, although controversies have arisen as to its interpretation, no contention, so far as we can discover, has ever been raised questioning the power given to render a judgment by default under the circumstances provided for in the statute."

Third.

The Act of the Legislature is primarily designed to protect the health of railroad employees and their families.

Section 3482 provides that railroad shops and division points which have been located for as much as five years shall not be moved without the permission of the Corporation Commission.

Section 3483 outlines the procedure before the Corporation Commission on application for removal.

Section 3484 provides that when such an application is filed:

"* * * The Commission shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting the various interests involved * * *."

It further provides:

"* * * That the Commission shall hear evidence and make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health

of the employees of said applicant or their families
* * *"

And the Commission shall deny the application if the removal * * * would endanger or injuriously affect the health of the employees of said applicant or their families."

Section 3345 imposes the burden of proof on the railway company.

It is obvious that this statute is an exercise of the power of the State to protect the health of railroad employees and their families by preventing railroads from moving terminals which have been located for a long time into a new location which is unhealthy and which endangers the health and safety of railroad employees and their families. The Act has no relation to the location of new division points or new shops. It only applies to those which have been voluntarily selected by the railway company, and which have been used for as much as five years. It does not prevent a change of location even under such conditions. It merely prevents a removal to an unhealthy location. It does not affect the movement of interstate commerce or of interstate commerce cars, except as they may be incidentally affected by preserving the health and safety of the employees. Assuming that the new location is a healthy one, it is obvious that it is the duty of the Corporation Commission to permit the move if the relative

efficiency and expedition of handling traffic through the proposed terminal" is an improvement.

Fourth.

A State may legislate to protect the health of railroad employees.

Legislation under the police power need not apply directly to every inhabitant of a state, but may apply only to those who come within the class affected. The power of governments, both national and state, to legislate in the interests of railway employees has been too often exercised to admit of debate.

In *Napier v. Atlantic Coast Line Railway Company*, 272 U. S. 605, the court has specifically announced the rule here laid down. The question involved in that case was whether the Federal Locomotive Boiler Inspection Act has superseded a Georgia statute prescribing an automatic door to the firebox of engines, and a Wisconsin statute prescribing cab curtains for the use of engines. Prior to the enactment of the Federal Act, similar state statutes had been held valid, but the court held in this case that the Federal Act had occupied the field and rendered state statutes on the same subject invalid. The opinion, however, lays down the rule definitely for which we are contending, the court saying, at page 610:

> "Each device was prescribed by the state primarily to promote the health and comfort of engineers and

firemen. Each state requirement may be assumed to be a proper exercise of its police power, unless the measure violates the commerce clause."

And, again, on page 611 the court says:

"The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. An automatic fire door and an effective curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly, and it may be found that to promote their comfort would likewise promote safety."

The state statutes involved in that case were held invalid, but not because the state did not have the power to enact them. The power to enact them was clearly conceded. They were held invalid merely because the Federal Act had occupied the field.

Clearly, therefore, the state has power to legislate to protect the health of railroad employees and their families, and this Act is a valid exercise of the state's police power unless it comes into direct conflict with some Act of Congress or with the Constitution.

Fifth.

There is no Act of Congress relating to the subject covered by this Act.

We state this point without argument. It is the mere statement of a negative. There is nothing in the Transportation Act or in any other Act of Congress relat-

ing to the subject. There was no contention made in the lower court that there was any such Congressional legislation, and we assume that no such contention will be made here.

In *Railroad Commission of California* v. *Southern Pacific Company*, 264 U. S. 321 (The Los Angeles Union Station case), this Court recognized a much broader power as still left to State Commissioners when it said, page 345:

> "One might, too, readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial capital outlay should be regarded as an ordinary exercise of the police power of the state."

In this quotation the Court recognizes the existence, notwithstanding the Transportation Act, of the power of state commissions to direct the construction of "merely local union stations or terminals."

If this power is left in the state commissions there is certainly nothing in the Transportation Act which can in any way affect the act of the legislature now involved, as it requires nothing in the way of construction but merely prevents the removal of division points and shops to an unhealthy location.

Sixth.

The Act here involved does not conflict with the commerce clause of the Constitution.

International & Great Northern Railway Company v. Anderson County, 246 U. S. 424:

That case involved a number of points not material here. It did involve, however, the validity under the commerce clause of the Office Shops Act of the Texas Legislature, and it held that that act was valid. We think that case is conclusive of the validity of this act. The act of the Texas Legislature involved in that case is described in the opinion of the Court, at page 430, as follows:

> "Act, approved March 27, 1889, c. 106; Rev. Civil Stats. 1911, Sec. 6423, provided that every railroad company chartered by the state or owning or operating a line within the state should permanently maintain its general offices at the place named in its charter, and if no certain place were named there, at such place as it should have contracted to locate them, otherwise at such place as it should designate; also that it should maintain its machine shops and roundhouses at the place where it had contracted to keep them, and that if the offices, shops or roundhouses were located on the line of a railroad in a county that has aided such railroad by an issue of bonds in consideration of the location being made, then such location should not be changed; 'and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.' A violation of the act entails forfeiture of the charter, with a penalty of $5,000.00 a day for every day of violation."

We call attention to the fact that the Texas Act prohibited removal of general offices, machine shops and roundhouses. The Texas Act had no relation to the health of railroad employees, but was a prohibition against removal. The Oklahoma Act does not prohibit the removal of shops and division points, but provides a method for removal. The only circumstances under which a removal is prevented are when the health and safety of the railroad employees and their families are involved. If the Texas Act was valid, it therefore follows that there is no doubt about the validity of the Oklahoma Act, because if a state can prohibit the removal of shops without regard to the health of the employees, then it can certainly prevent the removal of shops to a place where the health of the employees and their families is threatened.

Again, in the Texas Act there was no provision for an inquiry by the commission. There was a mere prohibition against the removal, while in the Oklahoma Act the removal is permitted after an inquiry and upon a finding that the health of the employees is not endangered.

The Texas Act was attacked as a burden on interstate commerce, and this Court, in passing on that question, says (p. 433):

> "The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one. It is said that the restriction imposes a burden

upon commerce among the states, since the road concerned has expanded and now is largely engaged in such commerce. The jury found that it imposed no burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that it desired. So far as the question depended upon the testimony adduced the verdict must be accepted, and although no doubt there might be cases in which this court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance the state has transcended its powers."

We think this decision is decisive of the issue.

On this appeal the question is whether in this instance the State has transcended its powers. The Texas statute was an absolute prohibition, while the Oklahoma statute is not a prohibition but a mere requirement that, before the move is made, application must be made to the Corporation Commission, a hearing had, and the facts determined as to whether or not the new location is a healthy one, and whether or not the move is in the interest of public convenience and economy of operation. If a prohibitory statute is valid, then certainly a permissive statute with conditions is valid.

The question involved on this appeal is not whether the railway company had made a showing upon which the Corporation Commission should give it permission to move its shops, but the question is whether the statute is valid. If the statute is valid, then the railway company is

not entitled to relief in the Federal courts until it has complied with the statute. It cannot ignore the statute and ignore the Corporation Commission, and proceed in the Federal courts on the assumption that the Commission would deny it relief if a proper showing were made. It must obey the law.

The argument of the railway company is that it can save money by moving. For the purpose of this case, let us admit it. But it could make this showing as conveniently to the Corporation Commission as it could to the Federal court. Suppose, on the other hand, we could prove that the railway company is making a mistake and that it will lose money by moving. Would that in any way affect the validity of the statute? Whether the railway company gains by the move or whether it loses by the move in no wise affects the regulatory power of the State. It merely is an argument one way or the other.

The simple fact is that the railway company has not complied with the orders of the Commission, but instead of doing so, that it has ignored the statute and has rushed into the Federal court without any effort to obey the statutory requirements or set aside the orders of the Commission. We discuss elsewhere the effect of the abortive application of the railway company requesting the Commission to ratify its unlawful removal.

In considering the constitutionality of this statute, the question involved is not whether in this particular case the railway company could make a showing justifying removal, but whether under any state of facts the statute is valid. If the State has the right to prevent railway companies from moving their shops and division points to unhealthy locations and/or to prevent railway companies from moving their shops and division points when the removal would involve increased expense of operation, then this statute is valid. It is, of course, possible that the Corporation Commission might make an order under the statute which would be invalid. It is possible that it might make an order which would be wholly arbitrary and unreasonable, and which the Federal courts would regard as depriving the railway company of its constitutional rights. There is a broad distinction between the validity of this statute and the validity of any order which the Commission might make under the statute. The sole question now presented is whether the statute is valid, not whether the railway company, by proceeding under the statute, could eventually establish its right to remove. If the statute is valid, this action must fail, and whether or not the railway company can procure an order from the Commission permitting its removal is not the question now involved, and is wholly immaterial.

We, therefore, ignore the argument of expense.

Seventh.

Laws passed by a State in the exercise of its police powers are valid, even though they indirectly affect interstate commerce.

The principles involved are clear, and the only difficulty is in their application. The states within their proper sphere are sovereign. The United States within their proper sphere are sovereign. Congress has the power to regulate interstate commerce. It was originally thought that until Congress acted, the state might act even in the regulation of interstate commerce. License cases 5 Howard 504. But this doctrine was subsequently overruled in *Leisy* v. *Hardin*, 135 U. S. 100. Although in that case there was a very able dissenting opinion by Justices Gray, Harlan and Brewer, it may now be taken as a settled rule that state legislation must not regulate interstate commerce. On the other hand, the states never surrendered their police power to the United States. Their power to protect and preserve the health, the morals, the welfare and the safety of their people has never been surrendered. They may in the exercise of this power and in the absence of Congressional legislation absolutely prohibit interstate commerce. For example, the States may prohibit the importation of diseased cattle. *M., K. & T. R. R. Co.* v. *Haber*, 169 U. S. 613. They may prohibit the running of freight trains on Sunday. *Hennington* v. *Georgia*, 163 U. S. 299. Similar legislation has been sus-

tained in a number of cases hereafter cited. The real question for consideration in every case is whether the legislation of the state is reasonably related to its declared object. If it is, or if the question is fairly debatable, the act is valid. For example, this Court in *Village of Euclid* v. *Ambler Realty Company*, 272 U. S. 365, says, page 388:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

Again, at page 395, the Court says:

> "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said *before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.*"

Again, the Court said in *Graves* v. *Minnesota*, 272 U. S. 425, at page 428:

> "By enacting the present statute the State has determined, through its legislative body, that to safeguard properly the public health it is necessary that no one be licensed to practice dentistry who does not hold a diploma from a dental college of good standing. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute."

Again, in *Massachusetts State Grange* v. *Benton*, 272

U. S. 525, at page 527, the Court, in upholding the daylight saving act, said:

> "But it also went on the important rule, which we desire to emphasize, that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."

We do not think there is any doubt about the Oklahoma statute being passed to protect the health and safety of railroad employees, and not as a regulation of commerce of any kind. It certainly cannot be said that it is clear that this is not so. It, therefore, follows under the rules laid down by this Court that this injunction should not issue. The shops and division point in this case have been located at Sapulpa since the railroad was constructed, and to leave them there long enough for the railway company to apply to the Commission for an order certainly would not have imposed on the railway company "great and irreparable injury." Having been there thirty-five years they might easily remain there a few months longer without materially injuring the railway company.

Bearing in mind these rules resolving the doubt in favor of the statute, we call attention briefly to a number of cases in which state legislation has been sustained against an attack under the commerce clause.

In *The Mayor of New York* v. *Miln*, 11 Peters 102, in

sustaining a statute of New York requiring the master of a vessel arriving from a foreign port to report to the Mayor an account of his pasengers, the Court, in discussing the commerce clause, says (p. 139):

"There is, then, no collision between the law in question and the acts of congress just commented on; and, therefore, if the state law were to be considered as partaking of the nature of a commercial regulation, it would stand the test of the most rigid scrutiny, if tried by the standard laid down in the reasoning of the court, quoted from the case of Gibbons vs. Ogden.

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive.

"We are aware that it is at all times difficult to define any subject with proper precision and accur-

acy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering.

"If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights, or their duties; whether it respected them as men, or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons, or of property, of the whole people of a State, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction."

In *Smith v. Alabama*, 124 U. S. 465, the Court sustained an Alabama statute requiring locomotive engineers to be examined and licensed by a Board appointed by the State.

In *Nashville, Chattanooga & St. Louis Ry. v. Alabama*, 128 U. S. 96, the Court sustained a statute requiring locomotive engineers to pass an examination showing their ability to discriminate between colors, and requiring the railway companies to pay a fee for the examination.

In *Plumley v. Massachusetts*, 155 U. S. 461, a statute was sustained prohibiting the sale of oleomargarine artificially colored.

In *Western Union Telegraph Co. v. Jones*, 162 U. S.

ute, a Georgia statute was sustained penalizing telegraph companies for negligent delay in delivering messages.

In *Brimmer v. Rebman*, 138 U. S. 78, a statute was sustained prohibiting the running of freight trains on Sunday.

In *New York, New Haven & Hartford R. R. Co. v. New York*, 165 U. S. 628, a statute was sustained regulating the heating of steam passenger cars, although the argument was made that different States might prescribe different regulations, thereby obliging a train running through two or more States in order that the railroad might comply with conflicting regulations.

In *Kansas, Missouri & Texas Coal R. R. Co. v. Atkinson*, 169 U. S. 366, an Iowa statute was sustained which provided that no contract shall exempt any railroad from the liability of a common carrier, even as applied to interstate commerce.

In *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, a Kansas act was sustained prohibiting shipment into Kansas of diseased animals.

In *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, an act was sustained which provided for the inspection of fertilizers coming into the State in interstate commerce, and imposing an inspection fee

In *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, a statute was sustained requiring railroad companies to stop at least three of their trains at every town containing three thousand inhabitants.

In *Ex parte Koiranski*, 109 U. S. 265, a city ordinance was sustained limiting the speed of interstate trains within the city limits.

In *Reid v. Colorado*, 187 U. S. 137, a statute was sustained prohibiting the introduction of diseased cattle or horses.

In *Crossman v. Lurman*, 192 U. S. 189, a New York statute was sustained prohibiting the sale of adulterated food and drugs, although moving in interstate commerce.

In *New Mexico v. Atchison, Topeka & Santa Fe Ry. Co.*, 203 U. S. 38, a territorial statute was sustained prohibiting a railroad company exercising the power to cross the tracks of the grantors, unless cities had not been incorporated.

In *Reid v. Colorado*, 187 U. S. 137, a statute was sustained which prohibited the transportation of cattle into the state from the north, except for immediate slaughter, which had not been proved as healthy by the proper state officials or by the National Bureau of Animal Industry.

In *Atlantic Coast Line Railroad Co. v. Watcrville*, 216 U. S. 122, a South Carolina statute was sustained re-

quiring railroads within a specified time to settle claims for loss or damage to freight, even as applied to interstate shipments.

In *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, a Michigan statute was sustained fixing the liability of telegraph companies for non-delivery of interstate as well as intrastate messages.

In *Chicago, Rock Island & Pacific Ry. Co. v. Arkansas*, 219 U. S. 453, the full crew law was sustained as applied to interstate trains.

In *Western Union Telegraph Co. v. Crove*, 220 U. S. 364, a Virginia statute was sustained imposing a penalty on telegraph companies for failure to perform a common law duty, even as applied to interstate messages.

In *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380, an oil inspection statute was sustained as applied to interstate shipments.

In *Savage v. Jones*, 225 U. S. 501, an Indiana statute was sustained regulating the sale of concentrated commercial feeding stuff, as applied to interstate commerce, although the Federal Food and Drugs Act was then in effect.

In *Grand Trunk Ry. Co. v. Michigan Railroad Commission*, 231 U. S. 457, an order of the Commission was sustained requiring certain railroads doing an interstate

business to use their tracks within the city limits of Detroit for the interchange of intrastate traffic.

In *Atlantic Coast Line Railroad Company* v. *Georgia*, 237 U. S. 280, a statute was sustained requiring railroads to use locomotive headlights of specified form and power, although it was argued that different requirements might be passed by different states, thus requiring railroad locomotives to have different headlights on two sides of the imaginary state line.

In *Sligh* v. *Kirkwood*, 237 U. S. 52, a Florida statute was sustained prohibiting shipment of immature citrus fruits.

In *Armour & Co.* v. *North Dakota*, 240 U. S. 510, a statute was sustained requiring lard to be put up in pails containing a specified number of pounds, even as applied to shipments from other states.

In *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158, a statute was sustained providing for the inspection of illuminating oils and gasoline while yet in interstate transit, and imposing an inspection fee.

In *Merchants Exchange of St. Louis* v. *Missouri*, 248 U. S. 365, a statute was sustained which prohibited any person other than a duly authorized and bonded State Weigher, from issuing weight certificates for grain weighed at any warehouse or elevator where State Weigh-

ers were sustained, even as applied to interstate shipments.

In *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427, a regulation by the State Board of Health was sustained requiring proprietary foods imported into the State and sold in original packages to bear labels stating the names and percentages of the ingredients.

In *South Covington & Cincinnati Street Ry. Co.* v. *Kentucky*, 252 U. S. 399, a separate coach law for white and colored passengers was sustained.

In *Western & Atlantic R. R. Co.* v. *Georgia Public Service Commission*, 267 U. S. 493, a rule was sustained providing that switching service shall not be discontinued without the consent of the Commission, even as applied to interstate commerce.

Eighth.

Imposing the burden of proof on the Railway Company is a valid provision.

The argument was made in the lower court that this provision renders the act invalid. On this point we content ourselves with citing *James Dickinson Farm Mortgage Company et al.* v. *Harry*, 273 U. S. 119.

Ninth.

It was the duty of the District Court to require the Railway Company to return its shops and division point to Sapulpa.

The point is, of course, immaterial in the event of an

affirmance, but, if there is a reversal, it becomes important. We, therefore, present the question at this time.

It will be noticed that the statute involved does not confer jurisdiction upon the Corporation Commission to require the railway company to restore the *status quo*. The power conferred upon the Commission is to consider the application of a railway company for permission to move, which, of course, it will grant or deny according to the facts.

If this case is reversed, then it follows that the railway company took advantage of the temporary injunction to do an unlawful act, and that it did it under the protection of an unlawful order. Obviously, therefore, the court which permitted the wrong to be done is the court which should correct the wrong. If not, why not? If the trial court is not the proper tribunal to correct the wrong, where shall the defendants go for relief? This Court, in reversing the previous order of the Commission, at 274 U. S. 594, says this:

> "The effect of the Commission's restraining order was merely to keep things in *statu quo* until the final hearing in the federal court. The interlocutory decree set the Railway free to move the shops before the case could be heard on final hearing. By ending the *status quo* which had existed for ten years, it exposed the city and its citizens to danger of irreparable loss. The change subjected Sapulpa to grave and immediate peril. Removal of the shops which had been located in Sapulpa for a generation would probably affect

> property values seriously and might bring disaster in its train. It might ruin business. It might result in unemployment. It might compel many of Sapulpa's citizens to seek homes elsewhere. On application for an interlocutory injunction such considerations are of weight."

The irreparable damage to the City of Sapulpa has been done and the evils which this Court pointed out as possible have become an accomplished fact, and all of this has been done by the railway company defiantly, arbitrarily, and in violation of the orderly procedure which this Court in its former opinion says should have been followed.

But the railway company says that it would cost it a large sum of money to move back to Sapulpa. Granted. If great corporations can flout the law and avoid restitution because the correction of their disobedience would be expensive, then the administration of justice must yield to the convenience of him who violates the law in large affairs, while the small man who only violates the law in small affairs would be the only one compelled to correct the wrong he has done.

But the railway company says, and the three judges in their opinion say, that the defendants (appellants) had the privilege of making a bond in order to prevent the temporary injunction from becoming effective, and that, therefore, they are not in a position to complain.

Would the members of the Corporation Commission, and the Attorney General of Oklahoma, and two citizens, of Sapulpa subject themselves to a possible great personal liability in order to correct a wrong done by the trial court? We submit that it was unnecessary for them to expose themselves to this personal risk, and that they discharged their full duty by diligently prosecuting the appeal to this Court.

Tenth.

It is well settled that on reversal of a judgment restitution will be ordered.

A leading case announcing this doctrine is *Northwestern Fuel Company* v. *Brock*, 139 U. S. 216. In that case the plaintiff recovered judgment against the defendant. The defendant appealed without superseding the judgment. The lower court ordered the plaintiff to return the money, although the decision of the Supreme Court was not based on its merits but on the want of jurisdiction in the lower court. It was contended by the plaintiff that as the court was without jurisdiction of the case, that it had no power to award restitution to the defendant or to have execution issued therefor. The question, therefore, which was decided was whether or not a court by whose process money had been illegally collected could, when it was ascertained that the court had no jurisdiction of the cause, issue execution to compel restitution.

The argument was made that if the court did not have jurisdiction it could not order restitution and could not issue execution. Justice Field wrote the opinion, in the course of which he says (p. 219):

> "The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question of discussion there has been as to the proceedings to enforce the restitution. Thus in *Anonymous*, 2 Salk 588, it was held by Holt, C. J., that 'Where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed, there, because it appears on the record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid; there must then be a *scire facias* suggesting the matter of fact, viz., the sum levied, etc.'
>
> "The same doctrine has been fully recognized by this court in *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8, 17. *In that case the court, after observing that the party against whom an erroneous judgment has been enforced does not lose his remedy against the party to the judgment, said: 'On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost;* and the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias*, when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored. 2 Salk. 587-8; Tidd's Pract. 936,

> 1137-8. And, no doubt, circumstances may exist where an action may be sustained to recover back the money.' We are of the opinion that the proceedings to enforce the restitution in the cases mentioned is under the control of the court, and that *all needed inquiry can be had to guide its judgment in a summary proceeding, upon motion of the parties, the only requisite being that the opposite party shall be heard*, so that in directing restitution no further wrong be committed. The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction."

In this connection the concurring opinion by Justice Brewer is interesting, and is as follows (p. 221):

> "I had supposed the law to be otherwise, and that if the Circuit Court did not have jurisdiction by reason of a lack of proper citizenship of the parties to render a judgment in favor of the plaintiff against the defendant, it was equally without jurisdiction thereafter in the same case and without any change in the citizenship to render a judgment in favor of the defendant against the plaintiff. But the result is so manifestly equitable I am glad to know that I was mistaken, and that the law is as it is now adjudged to be."

This case settles the point now in controversy. Here the railway company "has received the benefit of the erroneous judgment", and to require the railway company to restore the *status quo* "is so manifestly equitable" that the result should not be in doubt. Unless the *status quo* is restored the railway company secures the benefits of a valid judgment, whereas the judgment has been de-

clared by the Supreme Court to be erroneous. It is impossible to conceive of anything more unjust than to leave the railway company in the possession of rights under the erroneous interlocutory decree.

Arkadelphia Milling Company v. *St. Louis Southwestern Railway Company*, 249 U. S. 134, is likewise directly in point.

In that case the railway company secured a temporary injunction against the Arkansas Railway Commission restraining it from enforcing its schedule of rates. This injunction was continued in force until the final hearing, when it was made permanent.

Appeals were taken to this Court, and the decision of the lower court was reversed. The District Court then entered decrees dismissing the bills and ordering a reference to a special Master for the purpose of determining the damages. Shippers were allowed to intervene for the purpose of securing refunds of the excess rates collected under the injunction, and a decree was entered giving to the shippers the relief they sought. This Court held that as to excessive charges made while the temporary injunction bonds were in effect that recovery could be had against the railway company and the sureties on its bond, but as to excess charges collected under the final decree, which amongst other things discharged the bond,

that the judgment could only run against the railway company itself. At page 145 the Court says :

"But in our opinion, this portion of the claims is allowable against the railway companies themselves upon the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error 'be restored to all things which he hath lost by occasion of the said judgment'; and thereupon, in a plain case, a writ of restitution issued at once; but if a question of fact was in doubt, a writ of *scire facias* was first issued. *Anonymous*, Salk. 588, citing *Goodyere* v. *Ince*, Cro. Jac. 246; *Sympson* v. *Juxon*, Cro. Jac. 698; *Vesey* v. *Harris*, Cro. Car. 328; see also Lil. Ent. 641, 650; Arch. Append. 195, 200. The doctrine has been most fully recognized in the decisions of this court. *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8, 17; *Ervien* v. *Lowry*, 7 How. 172, 184; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216.

"That a course of action so clearly consistent with the principles of equity is one proper to be adopted in an equitable proceeding goes without saying. It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter of the parties, to correct that which has been wrongfully done by virtue of its process. *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219; *Johnston* v. *Bowers*, 69 N. J. L. 544, 547.

"It is argued that the claimant is not in a posi-

tion to invoke the principle of restitution in this proceeding because it was not a party to the original proceedings, but came in by intervening before the master. This point is unsubstantial. The railroad commission, in defending the rate schedules against the attack of the railway companies, represented all shippers; the permanent injunctions that were awarded by the final decrees restrained all shippers from taking advantage of the commission rates; and during the time that those decrees remained unreversed the railway companies obtained the benefit of the injunction by exacting from this claimant, among others, in addition to the commission rates, those excess charges that form the basis of the present claims. It is a typical case for the application of the principle of restitution; and the district court properly held the commission to be the representative of the shippers for this purpose."

It follows from these two decisions of this Court that everything taken under an erroneous decree must be restored, that the parties must be placed in *statu quo*, and that plaintiff can take no advantage by reason of the erroneous decree. In our case the only way in which to restore the *status quo* is to require the railway company to move its shops and division point back to Sapulpa. It would be a mockery of justice and abuse of the power of the court, and a reflection on the principles of equity jurisprudence to allow the railway company to retain the advantages which it has secured by reason of the erroneous order. It has not taken any money which may be restored. It has not taken any property which may be restored. It has merely invaded the rights of the de-

formants, and the only way in which it can make restitution is to protect those rights.

Other cases laying down the rule and applying it to various sets of facts are as follows:

St. Louis Southwestern Ry. Co. v. Texas &c. Consolidated Ry. Co., 200 S.W. 410 (writ ref. N.R.E.).

Kansas City Southern Ry. Co. v. Southern Express Company, 279 S.W. 1077 (writ ref. N.R.E.).

Memphis v. Cox, 20 Fed. 670.

Lake Shore &c. R. Co. v. Pacific R.R., 25 N.Y. 566.

Mississippi v. Mississippi, 11 How. App. 475.

Atlantic Coast Line R. Co. v. Richmond &c. Lines R. Co., 206 U.S. 1, 51 L. Ed. 933.

Morris v. Gross, 32 Wis. 494.

In High on Injunctions, Fourth Edition, in paragraph 34 the rule is laid down as follows:

> "Since the object of a preliminary injunction is to preserve the status quo, the court will not grant such an order where its effect would be to change the status. Thus, where the plaintiff seeks to enjoin the defendant from interfering with acts about to be done by the plaintiff against the objection of the defendant, a preliminary injunction restraining such interference is erroneous, since its effect is to destroy the existing condition of the subject matter of the suit by permitting the doing of affirmative acts by the plaintiff in advance of the final determination of his right to do them. And in such case the court may compel the plaintiff, who, after having had defendant's goods, has thus changed the status of affairs, to restore them to the same condition as that in which they were before the injunction was granted. And by the status quo which

will be prevented by preliminary injunction is denied the first motion, provided, nevertheless, such denial will be without prejudice to the right of the moving party to make a subsequent motion for such preliminary injunction, if he can show that there has been a substantial change in the circumstances existing at the time of the first motion, which would entitle him to the relief sought. In other words, the denial of the first motion is not to be considered as a decision on the merits of the controversy, but only as a decision that the moving party has not, at the time of the motion, made out a sufficient case to entitle him to the relief sought. Such a decision is not binding upon the court in subsequent proceedings, and the court may, upon a subsequent motion, grant the relief sought, if the moving party can show that there has been a change in the circumstances existing at the time of the first motion, which would entitle him to the relief sought. In other words, the denial of the first motion is not to be considered as a decision on the merits of the controversy, but only as a decision that the moving party has not, at the time of the motion, made out a sufficient case to entitle him to the relief sought. Such a decision is not binding upon the court in subsequent proceedings, and the court may, upon a subsequent motion, grant the relief sought, if the moving party can show that there has been a change in the circumstances existing at the time of the first motion, which would entitle him to the relief sought.

Discussion.

The motion to require the Railway Company to endure the status quo should have been heard by the District Judge, and it was error for the three judges to sit.

The point, it will probably not arise in this Court. If this Court should reverse the lower court and direct motion to be made, the lower court will of course, rule it whether the district judge will alone or whether the three judges sit. In the event of a reversal without a decision on the point last discussed, this point may require a decision, and it is only in the face of that possibility that we present the argument, although we felt at the time, and still feel, that it was necessary for the other two judges to participate in the hearing of that motion.

Section 266, United States Civil Judicial Code, as amended, provides the circumstances under which three judges must sit. It requires the presence of three judges at the hearing of an application for an interlocutory injunction, and authorizes an appeal direct to this Court from an order granting or denying an interlocutory injunction. By the amendment of February 11, 1925, the following clause was added to this section:

> "The requirement requiring the presence of three judges shall also apply to the final hearing in such suit in the district court, and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

It will thus be noted that there are only two occasions on which three judges must be present. One, the hearing of the application for an interlocutory injunction, and the other, the final hearing.

In all intermediate steps the district judge has authority to act. There are, of course, numerous intermediate steps between the interlocutory injunction and the final hearing; there may be motions to make the bill more specific and certain; there may be applications for a continuance; there may be applications to ascertain the damages which the defendants are entitled to recover from the plaintiff on its injunction bond, and there will be whatever proceedings are usual and incident to the progress of a lawsuit between the time it is filed and the time it is finally heard.

Under the law one of the three judges must be a Justice of the Supreme Court of the United States, or a Circuit Judge, and the other District Judge may be called in from a distant state. Is it going to be necessary to call on a Justice of the Supreme Court or a Circuit Judge, and a District Judge from such a long distance, to hear every application that may arise in this case during the next two or three years? To ask these questions is to answer them. It was not the intention of Congress to so greatly inconvenience the administration of justice, to so greatly inconvenience the Justices of the Supreme

Court, and the Circuit Judges, and the other District Judges. It was not the intention of Congress to so greatly inconvenience the parties to the litigation. It was not the intention of Congress to delay and frustrate the administration of justice by prescribing impossible machinery. On the contrary, it was the intention of Congress, as appears on the face of the Act, to expedite and not delay the matter.

This Court has applied a rule of strict construction to this section of the Judicial Code, and has held that it is limited to the specific terms of the Act.

For example, in *Moore, Insurance Commissioner, v. Fidelity & Deposit Company*, 272 U. S. 317, the Court held that a direct appeal to the Supreme Court would not lie under this statute unless the application for a preliminary injunction had been pressed, and that unless the application for a preliminary injunction had been pressed, three judges were not necessary for the final hearing. In that case the specific question involved was whether a direct appeal could be taken to the Supreme Court from a final decree where the application for the interlocutory injunction had not been pressed. In deciding that the appeal did not lie the Court said (p. 320):

> "The act of 1925 applies, as the decree of which review is sought was entered after May 13, 1925. Among the provisions enumerated in Section 238 as amended in Section 266 of the Judicial Code (Comp.

St. Sec. 1243). It is contended that this case falls within the latter section. It was amended by the addition of the following provision: 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

"Appellant contends that this appeal lies under Section 266, because the order of the insurance commissioner is an order of an administrative board, and the suit is one which seeks relief by way of interlocutory injunction suspending or restraining the enforcement * * * of an order made by an administrative board * * * acting under and pursuant to the statutes of such state, * * * upon the ground of unconstitutionality, * * *.

"In the case at bar there was an attack upon the order of the insurance commissioner 'upon the ground of unconstitutionality,' within the meaning of Section 266. *Oklahoma Natural Gas Company* v. *Russell*, 261 U. S. 290, 292, 43 S. Ct. 353, 67 L. ed. 659. It may be assumed that the order was action of an administrative board within the meaning of that section. Compare *Fidelity & Deposit Company* v. *Tafoya*, 270 U. S. 426, 46 S. Ct. 331, 70 L. ed. —. But the prayer for the preliminary injunction was not pressed, nor was there any request that the case be heard by a court consisting of three judges, which would have been necessary under Section 266, if the prayer had been pressed. That section as originally enacted applied only where interlocutory relief was actually sought, regardless of the scope of the bill. Its purpose was to minimize, in an important class of cases, the delay incident to a review of a decree granting or denying an interlocutory injunction. The general purpose of the act of 1925 was to relieve this court by limiting further the absolute right to a review by it.

> There is nothing in the provision added by that act to Section 266 which indicates a purpose to extend the application of that section—either as to the requirement of three judges or as to the right to direct appeal—to a case in which an interlocutory injunction was not actually applied for. The occasion for the provision was considered in the Ruder case. It authorizes a direct appeal to this court from the final decree of the district court only where an application was made for an interlocutory injunction and the case was heard before three judges. Dismissed."

The Court here lays down the principle that this Section of the code is to be strictly construed and that three judges are not necessary except in the two specific cases provided, that is to say, when an interlocutory injunction is sought and thereafter when the case comes on for final hearing. All intermediate orders obviously must be made by the district judge.

Smith v. *Wilson*, 273 U. S. 388, was a case in which there has been no application for an interlocutory injunction, but in which three judges sat at the final hearing. A direct appeal was taken to the Supreme Court, and the court held that this was improper. The court likewise held that this section of the code did not require a court of three judges for the final hearing when there had been no application for an interlocutory injunction. In the opinion it is said (p. 389):

> "Section 266 before the amendment of February 13, 1925, required, as it still does, all applications

for an interlocutory injunction restraining state officers from enforcing state statutes or orders of administrative boards or commissions, upon the ground of unconstitutionality, to be heard by a court of three judges. But as the section then stood, the final hearing might be had before a single district judge who might arrive at a different conclusion from that reached on the preliminary hearing by the three judges, one of whom was a justice of the Supreme Court or a circuit judge. *Compare Patterson* v. *Mobile Gas Co.*, 271 U. S. 131, 46 S. Ct. 445, 70 L. ed. 870, and *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 42 S. Ct. 244, 66 L. ed. 458. To remove this anomaly and save the right of direct appeal to this court from the operation of the repealing provisions of the Act of February 13, 1925, Sec. 266 was amended by the addition of the following provisions:

"'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

"See *Ex parte Buder*, 271 U. S. 461, 465, 46 S. Ct. 557, 70 L. ed. 1036.

"It is to be noted that this amendment provides that the 'requirement' of a court of three judges 'shall also apply' to the final hearing 'in such suit.' The question now presented is whether the phrase 'such suit' was intended to refer only to a suit in which a preliminary injunction had been in fact sought or to a suit in which an application for such interlocutory injunction might have been but in fact was not made. Before the amendment the section applied only when interloctuory relief was actually sought, regardless of the scope of the bill, and direct appeal to this court was permitted only from the de-

termination of the court of three judges on such an application. The general purpose of the act of February 13, 1925 (43 Stat. 936), was to relieve this court by restricting the right to a review by it. *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. —, 47 S. Ct. 105, 71 L. ed. —. The specific purpose of the amendment to Sec. 266, as already noted, was to end the anomalous situation in which a single district judge, on the final hearing might reconsider and decide questions already passed upon by the three judges on the application for an interlocutory injunction. Both purposes are accomplished if the amendment is taken as its language suggests, not to extend the application of the section with respect either to the requirement of three judges or the right of direct appeal to any case in which an interlocutory injunction is not sought. We conclude that the section as amended does not require a court of three judges on the final hearing unless an application for preliminary injunction is pressed to a hearing. In that case, an appeal whether from the determination or the preliminary application or from the final decree may be taken directly to this court. The plaintiff is thus given an election. He may either make application for an interlocutory injunction, which must be heard by three judges, in which case the final hearing must be heard before a like court with appeal directly to this court, or he may not press an application for an interlocutory injunction, in which case the hearing on the merits may be before a single judge, whose decision may be reviewed by the Circuit Court of Appeals and this court under other applicable provisions of the Judicial Code. Here there was not application for an interlocutory injunction and hence no necessity for a final hearing before three judges, although it may not have been erroneous for three judges to sit, a question we do not find it necessary to decide. There is therefore no jurisdiction in

this court to hear the appeal, which must accordingly be dismissed."

These two decisions of this Court clearly establish the rule of strict construction, and the application of that rule makes it obvious that three judges are unnecessary except in the specific cases required by law.

The responsibility for the decisions of the district court rests on the district judge, and so far as we know there is no provision of law authorizing other judges to take that responsibility away from him, or to overrule his authority. If three judges sit, necessarily two of them may decide the issue. It may be that the district judge entertains one opinion and the two visiting judges another. If so, the decision of the district court is rendered by two judges, neither of whom belongs in the district, and who thereby decide a case contrary to the opinion of the district judge who is responsible for that opinion.

United States Code Sec. 17 (Judicial Code Sec. 13 as amended), provides that under certain circumstances the senior Circuit Judge of a circuit may, if the public interest requires, assign a district judge to sit in another district, and Sec. 18 provides that such assigned judge may discharge all the judicial duties of the district judge in the district. Sec. 21 authorizes the senior Circuit Judge, when the public interest requires, to designate a district

judge to hold the district court in the place of, or aid of, any other district judge within the same circuit, and Sec. 22 provides for assigning a Circuit Judge to hold a district court, but none of these sections provide that the assigned judge shall sit with the district judge, and much less do they provide that any two assigned judges may out vote and thus displace the district judge.

In *Smith* v. *Wilson, supra*, there is a hint of impropriety in three judges sitting when the statute did not require it, the Court saying at the end of the opinion:

> "Here there was no application for an interlocutory injunction and hence no necessity for a final hearing before three judges, although it may not have been erroneous for three judges to sit, a question we do not find it necessary to decide."

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